STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0392

Donovan Casey,
Relator,

vs.

Wash N Fill Express of New Brighton, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed November 15, 2021
Affirmed
Connolly, Judge

Department of Employment and Economic Development
File No. 40896024-3

Donovan Casey, Inver Grove Heights, Minnesota (pro se relator)

Wash N Fill Express of New Brighton, Inc., Shoreview, Minnesota (respondent employer)

Keri Phillips, Anne B. Froelich, St. Paul, Minnesota (for respondent department)

Considered and decided by Florey, Presiding Judge; Connolly, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Pro se relator challenges an unemployment law judge's (ULJ) decision that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator Donovan Casey was employed as a full-time customer service representative at respondent Wash N Fill Express of New Brighton, Inc., d/b/a Tank N' Tummy (Tank N' Tummy), a gas station convenience store. Under Tank N' Tummy's cash-handling procedure, each shift begins with $200 in the cash register. As cash accumulates throughout the day, employees are expected to remove each additional $200 from the cash register to maintain a $200 balance in the register. The employees are "required" to bundle the bills, note the amount removed from the register, sign the note, and drop the cash in the store safe. Only the store's manager and accountant have access to the safe.

On May 13, 2020, Tank N' Tummy's manager noticed that Casey's cash drops were not in the safe. The manager then reviewed video surveillance from Casey's last shift, which showed Casey placing his drops aside, rather than in the safe, and eventually putting them in his pocket. When Casey came to work later that day, the manager confronted Casey about the drops. Casey pulled the drops out of his wallet and gave them to the manager. Casey told his manager that "he thought somebody was taking his money and he was coming up short all the time, . . . so he was gonna hold them until he came and talked to me." Casey was "immediately" discharged for misappropriating employer funds.

Casey applied for unemployment benefits with respondent Department of Employment and Economic Development (department), and a department administrative clerk issued a determination of ineligibility, stating that Casey was discharged because of aggravated employment misconduct. Casey appealed that decision, and a de novo hearing was conducted. At the hearing, testimony established that, during Casey's employment at Tank N' Tummy, Casey was "occasionally" short on his register. According to Casey, he suspected that someone was removing money from his cash drops and decided to hide his cash drops instead of putting them into the safe to see if the register balanced when his cash drops were not included. Casey claimed that he had done this twice before and that he "never attempted or meant to try to steal anything." Instead, Casey claimed that he was just "trying to prove [his] innocence."

The ULJ determined that "Tank N' Tummy had a reasonable right to expect Casey to follow its cash handling policies," and that "[a]lthough Casey denied taking the store's cash off the property, he admits that he did not drop it into the safe as required." The ULJ determined that because Casey violated his employer's reasonable policy, his conduct constituted employment misconduct. Thus, the ULJ concluded that Casey was ineligible for unemployment benefits. But the ULJ also determined that Casey's actions "do not amount to aggravated employment misconduct" because "a preponderance of the evidence does not support a finding that Casey intended to permanently deprive Tank N' Tummy of the money," rather "he always planned to return it." Casey subsequently sought reconsideration with the ULJ, who affirmed. This certiorari appeal follows.

DECISION

Casey challenges the ULJ's decision that he is ineligible for unemployment benefits because he engaged in employment misconduct. "[W]hether an employee engaged in conduct that disqualifies him or her from unemployment benefits is a mixed question of fact and law." *Wilson v. Mortgage Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). This court applies a de novo standard of review to a ULJ's determination that a particular act constitutes disqualifying conduct. *Id.*

Unemployment benefits are intended to provide financial assistance to persons who have been discharged from employment "through no fault of their own." *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). Accordingly, a person who has been discharged from employment based on "employment misconduct" is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2020); *Stagg*, 796 N.W.2d at 314. "Employment misconduct" is defined by statute to mean "any intentional, negligent, or indifferent conduct, on the job or off the job, that is a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a) (2020). The statutory definition of misconduct is exclusive such that "no other definition applies" to an application for unemployment benefits. *Id.*, subd. 6(e) (2020); *see also Wilson*, 888 N.W.2d at 458-59.

"An employer has a right to expect that its employees will abide by reasonable instructions and directions." *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *rev. denied* (Minn. Mar. 30, 2004). In general, "refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct."

Schmidgall v. FilmTec Corp., 644 N.W.2d 801, 804 (Minn. 2002); *see also McGowan v. Exec. Exp. Transp. Enters., Inc.*, 420 N.W.2d 592, 596 (Minn. 1988). "[W]hat is reasonable will vary according to the circumstances of each case." *Vargas*, 673 N.W.2d at 206 (quotation omitted). "When an employee's refusal to carry out a directive of the employer is deliberate, calculated, and intentional, then the refusal is misconduct." *Schmidgall*, 644 N.W.2d at 806.

Casey argues that the ULJ erred in concluding that he engaged in employment misconduct because he "showed great concern for [his] employment" by holding onto his drop money until he felt it was safe to do the drop in light of the "different daily counts" of the drop money. We disagree. In *McDonald v. PDQ*, an employee was fired for violating a company policy requiring cashiers to ring up purchases immediately. 341 N.W.2d 892, 893 (Minn. App. 1984). This court determined that the employee's conduct demonstrated a substantial disregard for his employer's interest because the "employer has the right to expect scrupulous adherence to procedure by employees handling the employer's money." *Id.*

Here, it is undisputed that Tank N' Tummy had a policy requiring its employees to make deposits in the store safe when the cash in the register exceeded $400. Under *McDonald*, Tank N' Tummy's policy is reasonable because an employer has a right to expect scrupulous adherence to procedure by employees handling the employer's money. *See id.* Casey admitted that on March 12, 2020, he failed to abide by this policy when he did not deposit his drops in the safe during his shift, and he acknowledged that his conduct was intentional. In fact, Casey admitted that he engaged in this conduct on two previous

occasions. Casey's deliberate refusal to abide by his employer's reasonable policy constitutes employment misconduct.

Casey also argues that the ULJ erred in concluding that he is ineligible for unemployment benefits because he was terminated in retaliation for his decision to apply for partial unemployment benefits on May 10, 2020, after his hours were reduced due to the COVID-19 pandemic. But Casey did not raise this argument before the ULJ at the de novo hearing. It is well settled that issues raised for the first time on appeal are generally deemed forfeited. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (declining to address issues raised for the first time on appellate review).

Casey acknowledges that he did not raise this issue at the de novo hearing but argues that he was "discombobulated" at the de novo hearing and that it was the ULJ's "sworn duty" to help him as a pro se party. To support his position, Casey cites *Thompson v. County of Hennepin*, which stated that "ULJ's have a duty to reasonably assist pro se parties with the presentation of evidence and the proper development of the record." 660 N.W.2d 157, 161 (Minn. App. 2003). But *Thompson* is easy to distinguish because, in that case, the relator had "requested subpoenas to compel the witnesses' attendance, [and] they did not appear at the hearing." *Id.* at 160. In contrast, Casey never requested subpoenas to compel any witness testimony. Rather, he simply failed to raise his retaliation argument below and otherwise present evidence in support of it. Although the rule on which *Thompson* is based has since been amended to impose on the ULJ a duty to assist *all* parties, Minn. R. 3310.2921 (2021), there is no indication the ULJ violated this rule. Instead, the record reflects that the ULJ explained the procedure, asked Casey if he had any questions

about the procedure, and specifically asked Casey if he had "any response [to the employer's rebuttal testimony] before . . . the hearing" was concluded. Thus, the ULJ did not fail to assist Casey by failing to inquire about a retaliation argument when there is no indication that the ULJ was aware of this argument.

Finally, Casey appears to argue that the ULJ should have considered his retaliation argument in his request for reconsideration. But Minnesota law provides that "[i]n deciding a request for reconsideration, the [ULJ] must not consider any evidence that was not submitted at the hearing, except for purposes of determining whether to order an additional hearing." Minn. Stat. § 268.105, subd. 2(c) (2020). Here, there is nothing in the record indicating that Casey requested an additional hearing. Absent a request for an additional hearing, the ULJ was prohibited by statute from considering any evidence that was not submitted at the de novo hearing. *See id.*

Moreover, to the extent that Casey did request an additional hearing, Minnesota law provides in relevant part that the ULJ must order an additional hearing only if the party shows that evidence that was not submitted at the hearing "would likely change the outcome of the decision *and* there was good cause for not having previously submitted that evidence." *Id.*, subd. 2(c)(1) (emphasis added). Casey claims that he simply forgot to mention his retaliation argument or submit any evidence related to it. Simply forgetting is not good cause. And, as the department points out, there is no indication that Casey's statement would likely change the outcome of the decision because the timeline of events indicates that Tank N' Tummy was not aware of Casey's application for unemployment benefits. Casey, therefore, cannot

establish that the ULJ improperly failed to consider his retaliation argument in the request for consideration.

In sum, the ULJ did not err by concluding that Casey engaged in employment misconduct. Accordingly, Casey was properly denied unemployment benefits.

Affirmed.